Neutral Citation Number: [2019] EWCA Civ 1360

Case No: B4/2019/1026

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM HHJ PARRY
SITTING IN THE FAMILY COURT AT CARDIFF
CASE No: CF18C00955

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/07/2019

Before:

LORD JUSTICE PETER JACKSON
LORD JUSTICE BAKER
and
MRS JUSTICE THEIS

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Between:

A	**Appellant**
- and	
Cardiff City Council	**1st Respondent**
- and –	
B	**2nd Respondent**
-and-	
X and Y	
(By their Guardian, Helen Tucker)	**3rd & 4th Respondents**

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Mr Mark G Allen (instructed by **Hurlows Family Law Practice**) for the **Appellant**
Mr Simon Stephenson (instructed by **Cardiff CC**) for the **1st Respondent**
The 2nd, 3rd and 4th Respondents were not represented

Hearing dates: 11th July 2019

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Approved Judgment

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MRS JUSTICE THEIS DBE:

Introduction

1. This is an appeal from orders made by Her Honour Judge Parry on 12 April 2019 in relation to two children: X (4 years) and Y (1 year) where she found the threshold criteria were established and made a care order in relation to each child, with a plan for the children to remain placed with their maternal grandparents.

2. The appellant is the mother; the father supports her appeal. The appeal is opposed by the local authority and the children's guardian.

3. The grounds of appeal put forward by Mr Allen, on behalf of the mother, can be summarised as follows:

   (1) The judge failed to give any, or sufficient weight to the parents' positive parenting and the expert evidence and gave too much scrutiny to the detail of an account of an incident by an 11 year old niece, Z, which may have caused the injury.

   (2) The judge failed to properly direct herself when considering the credibility of the parents' evidence (in particular that of the mother) with the result that her conclusions about credibility cannot stand.

4. On 14 June 2019 King LJ gave permission to appeal saying

   'The case was a so called 'single issue case' where the baby of otherwise unimpeachable parents sustained a single fracture. It arguable that the judge failed to give adequate weight to the expert paediatrician who, it is said, gave evidence that the account put forward by an 11 year old niece in her ABE interview of an account within the relevant timeframe provided a feasible explanation for the injury. Further, it is arguable that the judge erred in her approach to the evidence of the child witness, in respect of whom it is not suggested had been coached or coerced to give an account of an accident whilst the baby was in her sole care'. In granting permission, she gave leave for the grounds of appeal to be amended.

5. At the conclusion of the appeal hearing the parties were informed the appeal would be allowed, the judgment set-aside and the matter would be reheard before a different judge. The case has been remitted, with a directions hearing listed shortly through liaison with the Family Division Liaison Judge with a view to a rehearing in September.

6. This judgment contains my reasons for that conclusion.

Relevant Background

7. The mother and father are married and have two children, X and Y. Prior to the issue of these proceedings they had no previous involvement with the local authority.

8. On 17 May 2018 Y, age 5 months, attended with her parents to have her third set of immunisations. The father held Y whilst she had the injection, holding her arms and left leg as requested by the nurse. The nurse administered one injection to the left leg and two to the right leg. The parents recalled the nurse holding Y's right leg. Y cried and struggled at the time and the parents describe her being unsettled and crying afterwards. At the time they put this down to the effect of the injections.

9. The following day, 18 May, the parents went with X and Y to stay with relatives for the weekend, from Friday to Sunday. Those relatives have four children, one of whom is Z, then age 11 years.

10. On 19 May 2018 Z was briefly caring for Y unsupervised whilst the mother went and prepared some milk for Y. There are varying accounts as to how that came about: whether Z came to collect Y from the parents' bedroom and took both X and Y downstairs, or the mother came downstairs with X, Y and Z. In any event, it is agreed there was a period with no adult present. During that time Z went from sitting on the floor with Y on her lap to standing up with Y in her arms. During that manoeuvre Z subsequently described Y falling backwards, away from her body whilst she kept hold of her legs and pulled Y back to hold her against her body. The subsequent accounts refer to Z screaming or crying, and the mother returning to the room with a bottle and taking over care of Z. Y's crying was reported to subside when she took the bottle. At the time, other than Y being upset there was no suggestion anything of significance had occurred.

11. On the Sunday evening, 20 May, the family returned home. In his report Dr Cartlidge, the expert paediatrician, notes that Y had not moved her leg normally during the weekend and flinched when her leg was touched (it is not clear what the source of this information is). In a statement from the maternal aunt, who visited the family on the evening of 20 May, she refers to tickling underneath Y's feet, which made her move her left leg away but not her right leg.

12. As there was no improvement in Y's position the mother took Y to the GP, Dr Hunter, on the morning of 21 May. The doctor notes that the mother reported Y had been crying excessively since the immunisations and that both thighs felt hard at the injection sites. Y cried when the doctor palpated the injection sites, which were firmer than usual. The doctor thought the discomfort was caused by the immunisations and prescribed Calpol, with advice to review if there was further concern.

13. Later that evening the parents noticed Y's right leg was swollen and in the early hours of Tuesday morning (22 May) the maternal aunt took a photograph, which she exhibited to her statement. The mother noticed that the leg was still swollen on the 22 May and returned to the GP that day. She saw Dr Carter-Thomas who noted Y was distressed and that the circumference of the right thigh was 3cm more than the left and was very tender. Y was immediately referred for a paediatric opinion.

14. Y was seen later that day at the hospital by the paediatric registrar who noted swelling at the injection site of both thighs, no voluntary movement of the right lower limb and visible pain on moving it. The differential diagnosis was post-immunisation abscess or possibly a fracture. Following an ultrasound scan which noted a subcutaneous oedema of the right thigh, a 9x3mm hypoechoic lesion which might be a small abscess but more likely inflammation, the consultant paediatric radiologist advised against an x-ray.

15. Y stayed in hospital overnight and on 23 May a paediatric registrar noted Y to have no active movement of the right leg. Y was later seen by an orthopaedic registrar who diagnosed a possible small haematoma in the muscle caused by the immunisation, and again an x-ray was not thought necessary. Y was discharged home from hospital that evening, with a plan to review in the fracture clinic if the symptoms did not resolve.

16. Y continued to cry when moved and was unsettled. On 27 May the parents brought her to the out of hours service at the hospital, where her right thigh was found to be swollen but no pain was noted when moving the right hip. She was discharged home later that day.

17. On 31 May Y was brought to the fracture clinic where an x-ray finally took place. The x-ray findings were noted to be a displaced and healing transverse fracture of the mid shaft of the right femur with soft callus and periosteal reaction probably at least 10 – 14 days old. Further medical investigations revealed no other injuries. A referral was made to the local authority.

18. Y was discharged from hospital on 6 June. She was placed with the maternal aunt until 4 August, and thereafter with the maternal grandparents where the children remain. The parents moved into rented accommodation and contact arrangements three times per week were agreed with the local authority.

19. On 1 June Y was seen for a Child Protection medical by Dr Scheller (Consultant Paediatrician). Both parents were present. The father gave details of an incident when they went to stay with relatives the weekend after the immunisations and Y was left in the sole care of Z and said that Z *'remembers that Y suddenly cried but she was unsettled throughout the day anyway and often cries when she is not with the parents…nobody else had looked after Y during that time'*.

20. A strategy meeting took place on 5 June. The minutes are not in the papers although the social worker's statement relates that the meeting was informed about what the father told Dr Scheller.

21. Proceedings were issued by the local authority on 28 June 2018. The basis for establishing the threshold criteria was Y's fracture being non-accidental and having occurred whilst Y was in the care of one, or both parents. In the schedule of threshold findings dated 10 November 2018 the local authority put the timing of the fracture as being between 21 and 22 May.

22. In their respective responses to threshold each parent referred to the time when Z cared for Y unsupervised, the mother's is dated 19 July and the father's 20 July.

23. The case management hearing before the judge took place on 24 July 2018. The issue of an accidental cause of the injury when Y was in the care of Z was raised. In her judgment the judge refers to that hearing as follows [45] *'I indicated, probably quite strongly, that the court had no intention of joining a not quite 12 year old child as an intervener in a case of inflicted injury but that there might need to be an investigation if it was being put before the court as an explanation to be considered. The parents need to go away and reflect on whether they are advancing this as part of their case'.* Directions were given for expert and other evidence (including a statement from the father), and the final hearing was listed for five days on 7 January 2019, with an Issues Resolution Hearing on 17 December.

24. No further directions were made, or sought, regarding an accidental cause for the injury.

25. The police were involved from 31 May as noted in the police log in the core bundle. Both parents were interviewed by the police; the mother on 6 September and the father on 20 September. In each interview they refer to the incident with Z. The mother in some detail and the father in answer to a leading question, where he agreed there was nothing to suggest that anything happened with Z.

26. The Issues Resolution Hearing took place on 17 December. At that hearing one of the issues investigated was a return to parental care with the parents and children living with the maternal grandparents under a 'signs of safety plan'. The judge considered there was insufficient time to undertake the necessary assessment in the required depth. In her judgment the judge refers to a meeting between the social worker and the grandparents on 24 December and the resulting document as [3] *'…an inchoate plan to reunify under signs of safety and a balance sheet of factors that she had taken into consideration. She explained it very carefully in her evidence and the court was concerned whether enough was known about the family's attitude to the risk factors, the dynamic of the key relationship and the ability to manage risk if it was an inflicted injury to Y before the court could be confident about it as a plan'.* The judge records at [5] that at the end of the evidence the local authority had withdrawn plans for reunification. The children's guardian agreed with the local authority. If the court made a finding the injury to Y was inflicted the judge states [5] *'I was asked to provide a route map by which reunification would be advanced by the Local Authority if I felt able to on the evidence'.*

27. On 17 December the police made an application for disclosure of the documents filed in the family proceedings. It was processed two days later and returned to the police as the cheque sent with it had not been signed. It was re-lodged during the hearing, on 9 January and the judge directed the police to attend at 2pm on 11 January on what was expected to be the last day of the hearing when judgment was going to be given.

28. Expert evidence was commissioned from Dr Cartlidge (Consultant Paediatrician) and Dr Johnson (Consultant Paediatric Radiologist). In his report Dr Cartlidge confirmed the clinical features of the fracture would have been that is was very painful for about 10 – 15 minutes, thereafter the pain would have lessened and Y would have avoided movement of the right hip and knee and any handling in those areas would have been very painful for at least a few days. Swelling associated with the fracture is likely to have started to accumulate within a few hours and reach a maximum after about 24 – 48 hours. He notes there was a step change in the swelling and perceived pain from the right thigh between the two GP appointments and notes that Dr Hunter palpated the right thigh and does not seem to have found anything like the distress, tenderness and swelling observed by Dr Carter-Thomas the next day. Dr Carter-Thomas noted the right hip to be held in external rotation, a typical posture when the femur is fractured. Dr Cartlidge states he finds it *'virtually certain'* that if Y had a fractured femur between 17 and 21 May, she would have exhibited such great distress that the parents and their relatives would have sought medical attention at the start of this period. He notes the likely mechanism for the fracture is by a bending force or lateral impact. He concluded in his written report that the most likely cause of the fracture was non-accidental. His timing window was between 21 and 22 May.

29. In his report Dr Johnson, with the usual caveats about difficulties in timing fractures, puts the time frame as between 7 – 20 days of age on 31 May (11 – 24 May). He describes the mechanism as being *'a blow, impact or bending, snapping action applied to the bone'*, considers there is some angulation and movement round the fracture site which could have occurred as a result of a secondary less traumatic force. The fracture would be as a result of significant force applied to the bone, the movement and angulation around the fracture site occurred as a result of later applications of force which were less significant. Alternatively, the radiological appearances of the fracture could have occurred from a single traumatic event.

30. Both Drs Cartlidge and Johnson ruled out any underlying medical cause for the fracture, although those issues were the subject of some consideration at the January hearing.

The January hearing

31. The final hearing started on 7 January. Evidence was given by the allocated social worker, the nurse who undertook the immunisation injections, Drs Hunter and Carter-Thomas, Dr Cartlidge, the parents and the children's guardian.

32. In the note of his oral evidence on 9 January Dr Cartlidge confirmed his opinion that at the time of the fracture there would have been a change in Y's cry but noted in one of his answers, in the context of Y reported to have a high pitched cry, *'…If Y was already crying very loudly for an alternative reason then a change in the volume of the cry could be masked – increase in volume would have been smaller. Someone in home would have less chance of realising if Y- was crying and continued to cry.'* A little later in his oral evidence he states he is not *'comfortable'* with there being an un-displaced

fracture that then moved and became displaced, although accepted he couldn't say for certain that it was not the case.

33. Closing submissions were made on 10 January and the judge intended to give her judgment on 11 January.

34. Late on 10 January the police notified the court that it was their intention to withdraw the application for disclosure because the police investigation had concluded on the basis that there had been a third-party admission. The judge sought clarification and the police emailed the investigation log which is in the core bundle. It is 16 pages long and records at the bottom that it was printed at 09.48 on 11 January. We were told this document was made available to the parties when they attended court on 11 January.

35. The parent's solicitors were also updated by the police late on 10 January. The father's solicitors notified the father whilst the parents were visiting Z's parents' home that evening. The father was reported as being pleased with this development.

36. The police log revealed that the police had spoken to the maternal aunt on 27 December. The judge described in her judgment at [8] that *'an alternative mechanism had been identified which had occurred during the time that Z was alone unsupervised with Y'.*

37. The police log disclosed the following had taken place, none of which had been referred to by the parents in their oral evidence or by the local authority in the evidence they had called.

38. On 9 November the police spoke to the aunt, Z's mother, in whose home the parents and children had stayed over the weekend prior to the GP visits. The police log refers to the aunt describing Y as crying all weekend.

39. On 27 December the aunt contacted the police stating she was worried about Z (in her statement she said she had been trying to contact the police for a number of days), Z's behaviour had changed, and she wouldn't talk to Y's parents. She was worried something had happened when Z was caring for Y. As a result of that information DCs Hacker and Bartley attended the aunt's home on 28 December to talk to the aunt and Z. The notes record Z describing how when she got up with Y in her arms Z jumped '*backwards into her body and screamed'*. The police noted this was consistent with the mother's account in her police interview. The record notes that Z was visibly upset speaking to the police officers and that she was less worried having spoken to the police officers. Z said she was scared and worried that Y's leg *'could have happened in the living room'*.

40. On 30 December the police record notes that DC Hacker called the mother to update her. It is unclear from the record whether this is a contemporaneous note or a subsequent summary. DC Hacker told the mother that under no circumstances were they saying Z was responsible and they didn't want it to affect the wider family relationships as the aunt had been very *'open honest and transparent'*. The note records the mother saying she still wanted to know

what happened to Y's leg and DC Hacker responded that the medical report and the family court investigation was still ongoing, that is where the conclusion will be made. The mother then asked if the police were still interviewing the nurse who had carried out the inoculations, and DC Hacker responded they were not doing that at this time. The record notes that due to Z's disclosure DC Hacker and DS Hill were satisfied not to take any further action and contact was going to be made with the family court about the disclosure application. The record concludes with a note that DC Hacker was on annual leave until 7 January.

41. In the light of this additional information the judge decided on 11 January that the parents should be recalled for further oral evidence, due to her concerns about possible collusion within the family. The transcript of the parents' evidence is before this court. It times the mother's evidence as between 12.20 – 1.56 pm, and the father's between 4.06 and 6.10 pm. The father needed an interpreter and arrangements had to be made for one to attend court. During questions by the judge she expressed some surprise that the parents had not mentioned the phone call with the police on 30 December in their oral evidence, including the fact that the police decision was based on the conversation they had had with Z. The transcript records the following:

Judge: *You're asking me to believe that you're rung up out of the blue by the police that say 'This isn't going any further. We've been to speak to Z' And you didn't think that there was any link between the conversation that they had with Z and the decision that they'd made?'*

Mother: *I didn't know, no.*

42. The judge then pressed the mother (over about 8 pages of the transcript) about what, if anything, she took issue with, in the police log. The exchange concludes as follows:

Judge: *So, the only thing that you don't agree with in this entry are that you were updated on what the police had been doing and that DC Hacker did not tell you that the police were not accusing of Z of breaking Y's leg?*

Mother: *Yeah*

Judge: *Why do you think she's made them up?*

Mother: *I, I don't know why she wrote that but she didn't – she did mention (several inaudible words) I wouldn't hide that (several inaudible words)*

Judge: *But you are telling me that she's made it up in her entry. So, why would she want to make that up?*

Mother: *I really don't know why. I don't know why but she didn't mean anything about (several inaudible words)*

Judge: *If she has made a careful note of what she discussed with you, do you think her note is more reliable than your memory?*

Mother: *Erm, I do remember that day and she doesn't mention anything about Z. I would've been honest. I would've said about Z before coming to court (overspeaking)*

Judge: *Do you understand that you are accusing a police officer of deliberately falsifying a record which would have an impact on the inquiry and on this court? Do you understand the importance of what you just said?*

After a few more exchanges the judge concludes the questions with…

Judge: *The answer to my questions is, 'No, I do not think that her written record of our discussion or shortly after the discussion is more reliable than my memory'. That is your answer?*

The further evidence

43. Following this evidence being given directions were made for Z to be ABE interviewed by an independent social worker. This took place on 22 January. All this additional material was reviewed by the experts, who provided updated reports and the matter listed for a further three days on 10 – 12 April.

44. In the ABE interview Z demonstrates what happened with the use of a doll. She describes getting up from the floor with Y in her arms, Y throwing herself backwards away from Z's body, whilst Z was holding onto Y's legs and Y's upper body going over the horizontal line before Z was able to hold her back to her body.

45. Having viewed this additional material Dr Cartlidge provided a further report. He considered from what he saw (appreciating that it entailed some speculation) that when Y jerked backwards it is quite likely Z's left hand would have grabbed hold of the back of Y's right thigh and in these circumstances most of the weight of Y would lever her right thigh over the Z's left hand, acting as a fulcrum. He considered what took place could have caused the fracture and the subsequent clinical features are consistent with a non-splintered fracture becoming displaced thereby worsening the pain and swelling.

46. At the hearing in April further oral evidence was given including by Y, Dr Cartlidge, Z's mother and the parents. In the note of his oral evidence on 10 April Dr Cartlidge confirmed he was more comfortable with the mechanism described by Z if the weight pivoted mainly on the right thigh rather than both thighs. Additionally, Y had to fall back beyond the horizontal line.

47. Judgment was given on 12 April.

The Judgment

48. The judge set out the law between paragraphs 18 – 26. No party makes any criticism of that part of her judgment. She reminded herself that the burden of proof is on the local authority and gave herself a *Lucas* direction referring to the fact that witnesses can be untruthful for a variety of reasons and continued [21] *'The pressures that parents in particular are under in care proceedings*

can allow them to give evidence which is not completely truthful because they are in fear, distressed, in panic or because they feel a loyalty to another witness or party to the proceedings'.

49. The judge reviewed the medical evidence and stated at [29] *'In the light of the evidence the window [when the fracture occurred] is reduced to 11 to 21 May because I am satisfied based on the evidence of the maternal aunt ('A') that the injury was present and, on the balance of probabilities, angulated by midnight on 21 May'.*

50. Between paragraphs [30] – [41] the judge continued to review the medical evidence before she turned to consider what she termed '*the evolution of all of the explanations which the parents have advanced'* [42]. She noted the main focus of the January hearing had been whether the nurse had caused the fractures on 17 May when Y had her immunisation injections. At this appeal hearing we were informed that this theory had been pursued more vigorously on behalf of the father than the mother.

51. Between paragraphs [43] – [51] the judge considered the history of the evidence relating to Z's account and then stated:

52. On the medical evidence as I heard it in January, the conclusion would be that there was a complete fracture by 22 May which may have been displaced or become angulated between the original injury and the baby's presentation on 22 May and it would certainly have taken place by the late evening of 21 May.

53. Dating the injury is difficult and earlier symptoms may have been masked by her general distress about the vaccination sites themselves…my conclusion (and one which will come as no surprise to the advocates or the parents) is that there is no real likelihood that sufficient bending force was generated during the immunisation process to provide the force necessary for the fracture.'

52. The judge then asked, rhetorically, why the parents focussed on immunisation being the cause of the fracture, then continues [54] *'Having ruled out 17 May, in the absence of any other plausible account, this becomes an unexplained fracture which the baby could not cause to herself which she had experienced when she was in the primary care of both her parents in the relevant period and quite clearly there was the opportunity on 19 May, after the mother recovered the care of Y for Z, for something to have happened whilst she was solely responsible for Y's care.'*

53. Between [55] – [57] the judge considered the parents circumstances at the time of the injury and continued [58] '*The immunisation issue is an important issue in respect of the parents credibility and therefore the weight to be attached to any denials of an inflicted injury'.* After noting the parents did not mention anything untoward happening during the immunisation even though they saw a number of medical professionals during that time, the judge recognised that the parents didn't know there was a fracture until 31 May yet noted that they did not mention the immunisations until the child protection medical on 1

June. The judge thought it unusual that the mother could not remember who had raised the issue and remarked *'There was a sense that she needed permission to answer the question…'* [59].

54. In paragraphs [60] and [61] the judge considered the mother's account of the immunisation appointment and between [62] – [67] the history of the account given about Z caring for Y unsupervised and how that evolved through the involvement of the police. She concluded [68] *'Mother has not been truthful with the court in relation to the conversation between herself and DC Hacker'* She noted DC Hacker was unable to give oral evidence due to ill health but continued [68] *'I am satisfied that the note of the conversation prepared by DC Hacker contains all of the information that the parents would need to know….I have to arrive at the conclusion that DC Hacker gave sufficient information as an explanation as to why the investigation was not going ahead.'* The judge then asked a series of questions as to why the mother would seek to minimise the information given to her by DC Hacker and was critical of the mother for not asking the police what Z's account was and of the differences in the parent's evidence about what they knew about the police position on the evening of 10 January. However, at [75] the judge recorded that the local authority were not putting a case that Z had been coached or coerced to give an explanation.

55. In the final paragraphs of her judgment the judge concluded as follows:

'76. The mechanism requires an anchoring of the right thigh with the weight on that thigh to cause a fracture. That is not what Z demonstrated. Mr Evans would like me to take the plums from the demonstration and leave the rest, but I cannot both reject and accept her account at the same time if it is to be a plausible accidental explanation for the fracture. I have to add to that mother's description of Y during her absence and the sound of her crying, which does not fit with the sound of a crying that would be expected from a child who had suffered a serious fracture to her femur. Dr Cartlidge's description is extreme pain.

77. The incident, even if it happened in the way in which there was the backward jerk as Z got up from the floor, would not have been her fault because she simply should not have been placed in that situation. What Z demonstrated was holding the doll with her left arm below her right arm and at the bottom of her legs. The right hand moved at some point to the top of the right thigh but not a clear demonstration that that leg held in that position was supporting Y's weight. Even so, the rest of her right arm and her left arm would have been stabilising the baby's body and even if it were a panicked reaction as it may well have been there would have been a swift move which she demonstrated to scoop the baby up and to place her right arm firmly behind the baby's upper back to lift the baby up. Furthermore, if she is right in her demonstration that her arms were at about waist level when she tried to get up from the floor, it lessens the possibility of how far back the baby went.

78. I have come to the conclusion therefore that the Local Authority have satisfied me that on the best evidence available which is the demonstration provided by Z, it does not offer a plausible explanation for the fracture. If I add to that the very unsatisfactory evolution of this explanation and my findings about the credibility

of the parents about which I have significant reservations and my conclusion that the parents fabricated the account of the immunisations, it points in the direction of me not being able to accept the plausibility of their denial jointly and severally that something happened to Y during their care of the baby. I therefore arrive at the conclusion that Y's fracture is an inflicted, not accidental injury, brought about by the care offered to her by way of the care of her by one or other of her parents. '

56. The judge made findings about the parent's situation at the time and the strain she considered they were under before stating [80]

'80. My conclusion is that one or both of the parents know that there has been an event involving one or other of them, that they have pursued other causes outside of the family and used their utmost endeavours to protect or prevent Z's explanation being considered by the court. The only logical reason on the balance of probabilities for them to do that is that one or both of them knew that that event could not possibly be the incident which had caused the injury because there was another one.' She concluded at [81] that she does not find that the parent who did not cause the injury failed to protect.

57. The judgment then turned to consider welfare in the following way '

'82. There is virtual acceptance of the fact that my conclusions, if they are as I found them, mean that reunification is not possible at this time. The route map is particularly difficult to structure in a case of this type. It would have to factor in that X was cared for in an entirely satisfactory way by his parents and if X's case stood alone with no other evidence, these proceedings would never have been started. Overall, the parents appear to have more than adequate parenting capacity; however, my findings are to the effect that they have obstructed the process of investigation by the court by creating a false account and by attempting to withhold an account that might have been plausible and should have been investigated at a very much earlier stage.'

58. In paragraphs [83] and [84] the judge noted the difficulties in the relationship between the parents and the local authority, her concern at the strength of the plea by the paternal grandfather for X to be reunited with his parents and the need for the local authority to be persuaded that Y was developing into a child that offered little or no challenge to her parents. Finally, as a single issue case '*managing the risks around the physical care and the challenges of [Z's] behaviour is at the heart of any future risk assessment which the local authority **elect** to carry out' (emphasis added).* The judge continued at [84] *'Further than that I cannot go and I certainly am not in a position to indicate any sort of timescale other than to invite the Local Authority to look at the stages of Y's development, to assess her responses to her development and to look at how the parents are working with the Local Authority. In many respects, it is in the hands of the parents and how they respond to the findings which will determine the duration before reunification could be considered'.*

59. The judge finally concluded *'I therefore make the finding of inflicted injury. I find the threshold satisfied on the basis of actual and risk of future harm to Y*

and risk of physical harm to X as prayed by the Local Authority. I grant them a care order on their revised care plan.' [85]

Submissions

60. Mr Allen, on behalf of the mother, submits, with some force, that on the facts of this case the judge's rejection of the Z incident as being a credible explanation for the injury is flawed for the following reasons:

(1) Excessive weight was given by the judge on her observations and analysis of the ABE video, with insufficient, or any, weight being given to other evidence, including the balanced view of Dr Cartlidge, who considered what Z described as being a possible cause; factors such as the fact that Z's account had not been given until sometime after the incident were given undue weight.

(2) There was a failure to properly weigh in the balance the positive evidence about the parents, not only prior to proceedings but also during the assessments undertaken during the proceedings.

(3) There was overreliance by the judge on her assessment of the credibility of the parents (in particular the mother) and her flawed approach to the *Lucas* direction. For example, the judge failed to properly factor into the balance when assessing the credibility of the mother (i) the possibility of the mother misunderstanding the effect of the phone call from DC Hacker on 30 December, and (ii) that in the absence of a misunderstanding it made no logical sense for the mother not to inform the court in January about the police phone call on 30 December, as it provided an alternative explanation for the injury.

(4) In addition, there was no consideration by the judge of why the parents should have colluded to conceal the content of the phone call from DC Hacker. As Peter Jackson LJ observed during the hearing, it was a 'pointless collusion'.

61. Mr Stephenson, on behalf of the local authority, relies primarily on the importance to be attached to the fact that the judge had the benefit of hearing all the evidence and that, as a result, this court should be slow to interfere with any findings she made based on that evidence. For example, the judge accepted Dr Cartlidge's evidence but differed from him in the factual foundation that underpinned it from her viewing of the ABE interview. She was entitled to do this.

Discussion

62. This was undoubtedly a troubling case involving a serious injury to a pre-mobile child. The case took an unexpected turn just prior to judgment being given with relevant information being provided by the police which had not been before the January hearing. I have considerable sympathy with the judge who had to manage a situation that developed with limited notice to the court, and the parties.

63. One of the difficulties this court has found in considering this appeal is the lack of structure in the judgment. It has a narrative style, making it difficult to discover precisely what findings had been made, and why. For example, it remains unclear what the judge's findings were about the timing of the fracture and then, in turn, how that fed into the other findings. If the judgment had been set out in sub-headings it would have been easier to follow and identify what conclusions were reached and why. A key component of any conclusion or finding in a judgment is for the reader to understand what the finding and conclusion is together with the underlying rationale.

64. The judge adopted an approach to the evidence of excluding explanations in turn, rather than looking at the evidence for and against each explanation and then standing back, reviewing the broad canvas of evidence before reaching a conclusion. This approach risks leading to default findings, rather than ones based on consideration of all the evidence. This approach is illustrated by the weight the judge gave to the detail in Z's ABE interview. She described watching it four times and gave her own detailed critique of what she observed. In considering that aspect of the evidence in the way she did, she risked failing to assess that evidence in the context of other relevant evidence, such as that from Dr Cartlidge, before reaching a conclusion.

65. Mr Stephenson is right to remind the court that the appellate court should only contemplate allowing an appeal from a trial judge's findings of fact in circumstances where the conclusion was one (i) which there was no evidence to support; (ii) based on a misunderstanding of the evidence, or (iii) which no reasonable judge could have reached (*Re B (A Child)* [2013] UKSC 33 [52] per Lord Neuberger*)*.

66. Mr Allen accepts that general proposition but submits that in this case the judge either gave too much weight to some aspects and/or little or no weight to other aspects of the evidence, with the consequence that the rationale that underpins her conclusions is flawed and the conclusions she reached cannot stand.

67. The unusual sequence of events in this case raises the following wider points of importance about the investigative nature of care proceedings:

    (1) The circumstances of Z caring unsupervised for Y was an issue raised by the parents at a very early stage during the child protection medical on 1 June and was referred to by the parents thereafter, for example in their response to threshold and police interviews. It was recognised as an issue at the CMC hearing on 24 July however taking it any further was met with strong disapproval by the court. The judge said in her judgment at that hearing that the parents needed to reflect if they were going to pursue this explanation. This appeared to be in the context of the judge's concern about such a young child, Z, being joined as an intervener.

    (2) Such an approach by the court risks pre-judgment, and in this case an opportunity was missed to case manage the information effectively.

(3) Evidence of such an explanation should have prompted the local authority to instigate a staged process, starting with neutral evidence gathering (similar to that which took place between the January and April hearing when Z was the subject of an ABE interview), or if they didn't instigate such a process to provide an explanation why not. Having this structured approach ensures the local authority review the basis upon which they seek findings to be made. This is part of their obligation, as a public authority seeking to interfere with the Article 8 rights of the parents and the children, to keep under active consideration the evidence they rely on to seek to establish the threshold criteria are met. This is particularly so in a single-issue case, where there are no other concerns relating to the children.

(4) If the local authority did not put such a process in place, or failed to explain why they hadn't done that, then directions for this should have been actively sought from the court by the other parties. The court is under an obligation to ensure that it has all the information that might reasonably bear on the question in issue. It will be a matter of judgment as to how this obligation is met in each case. The court must ensure that so far as is possible each objectively realistic possibility is properly investigated and assessed on its merits. Those representing the child need to be proactive in this respect, mindful of their obligation to protect each child's Article 6 and 8 rights, which include ensuring the court has all the relevant information available prior to reaching any decision.

68. Despite recognising the great advantage the trial judge has in relation to the evidence she saw and heard, I have reached the conclusion that the decision in this case cannot be allowed to stand for the following reasons:

(1) The lack of a coherent structure in the judgment providing clarity as to the findings made by the judge. For example, the timing of the fracture, which is a critical feature of this case. At [29] of the judgment the judge states '*..the window is reduced to 11 – 21 May because I am satisfied based on the evidence of the maternal aunt ('A') that the injury was present and, on the balance of probabilities, angulated by midnight on 21 May.'* It remains unclear whether she concluded that the whole injury was as a result of one event between the two GP appointments on 21 and 22 May, or that there was a displacement in that time period of an earlier fracture. There is insufficient analysis of either the time period, the relevant surrounding evidence (such as how Y behaved and presented) or the circumstances of the parents at the relevant time (when they were alone and/or who else was present).

(2) The failure to undertake an effective *Lucas* analysis. When there is a finding that a witness has lied, the court then needs to carefully consider (i) why that witness may be lying, what other explanations there may be, and (ii) what effect, if any, it has on the facts in dispute. In this case the judge seemed to make the leap from a finding about an account by the parents of an event (e.g. the non-disclosure of the police call on 30 December) to a finding of a cover up (see judgment [80] and [82]), in circumstances when

that was not being alleged by the local authority and where such concealment was of no benefit to the parents

(3) The lack of balance in reaching the conclusion as to the credibility of the parents (in particular the mother) when that assessment formed a significant part of the reasoning for her decision (see [78] *'…my findings about the credibility of the parents about which I have significant reservations and my conclusion that the parents fabricated the account of the immunisations…'*. This lack of balance included the following matters:

(i) Not properly weighing in the balance that the judge had not heard oral evidence from DC Hacker when accepting her note in the police record instead of the mother's oral evidence, in circumstances where the mother's oral evidence had been given with little or no notice of giving evidence about this matter or a fair opportunity to consider the police log she was being questioned about.

(ii) Not considering as a possible explanation for the parents from not mentioning the police phone call on 30 December in their evidence in January being due to a misunderstanding, rather than a lie. The possibility of this is raised as the note from DC Hacker records the mother, having been told the police were taking no further action, asking if they were going to interview the nurse who did the inoculations. This request made little sense if she had understood the police were taking no further action. Additionally, there was no benefit to the parents not mentioning this at the January hearing. On the contrary, they had everything to gain by doing so, as the Z incident provided a possible explanation for the injury.

(iii) Placing too much weight on the failure of the parents to mention the circumstances of the immunisation earlier (as the judge noted at [58] *'The immunisation issue is an important issue in respect of the parents' credibility and the weight to be attached to any denials of an inflicted injury'*), the mother's description of what took place during that appointment and the conflict in evidence about what was known by the parents about the police decision on 10 January without considering whether the mother could have been mistaken about these matters.

(iv) Erroneously drawing an adverse inference against the parents about the Z incident that the judge described the parents [62] *'now'* rely upon. The judge questioned [73] *'why they were so reluctant to raise this [the Z incident] as a possibility for enquiry by the court'* and the [42] *'late point in the proceedings in which this explanation [the Z incident] was advanced for the first time'* in circumstances where the parents had referred to it the day after the fracture was identified, had raised it with the court at the CMH in July when the court had given discouragement to it being pursued, or any further steps being taken. No account is taken of the fact that the parents had nothing to gain from it not being advanced.

(v) Drawing adverse inferences against the parents from their failure to mention during the January hearing and/or otherwise discuss the details of what Z said further with Z's mother without sufficiently factoring into the

assessment (a) any possible misunderstanding by the parents of the position taken by the police; (b) the evidence that the parents were reluctant to place any responsibility on Z, which could explain why they didn't enquire or know what Z said; and (c) the fact that they had nothing to gain by not revealing this information in the absence of any suggestion or findings sought by the local authority of collusion in the family regarding the Z incident.

(vi) Failing to give sufficient weight to the positive evidence about the parents. The reference to their previous good care in the judgment at [61] was generalised and somewhat muted. There is no recognition of the references in the parenting assessment to their positive engagement with that assessment and the parents being described as *'engaging, cooperative and understanding of what children need'* and the parents relationship being assessed as *'stable and they are fully and consistently supportive of one another'*.

(vi) Concluding in [80] that '*[the parents] have used their utmost endeavours to protect or prevent Z's explanation being considered by the court'* and [82] '*…[the parents] have obstructed the process of investigation by the court in creating a false account and by attempting to withhold an account that might have been plausible and should have been investigated at a very much earlier stage'* when that conclusion was not supported by the evidence.

69. Therefore, if my Lords agree, the conclusion that Y's fracture is an inflicted not an accidental injury and that one, or both, of the parents know of an event that caused it cannot stand.

70. This court was initially invited to consider, if the appeal was allowed, making its own determination. That was wisely not pursued by Mr Allen in the light of the lack of clarity about the findings made by the judge, particularly in relation to timing of the injury. As a result, there will unfortunately need to be a re-hearing.

71. Although not the subject of the appeal, it is also of concern that a final care order was made in relation to each child on what appeared to be a very limited analysis of the options. Only the final three paragraphs of the detailed judgment considered the question of what order should be made, with no reference being made to the welfare interests of each individual child. What analysis there was appeared to be based on dated information; the last care plan in the papers is dated 16 November (over five months old by the time of the April hearing) and there appeared to be no updated analysis by the children's guardian (the latest report is dated 10 December, some four months prior to the April hearing, and seems in large part to replicate the local authority's analysis). It remained unclear, on the information before this court, whether any active consideration was going to be given to reunification of the children with their parents, either separately or together and what evidence there was, or should have been, about the balance of risks of physical and emotional harm in such a course. A decision of this importance could not be made on the basis of a '*virtual acceptance'* that the factfinding determined the

welfare outcome. This issue will no doubt come under fresh scrutiny at the rehearing.

Lord Justice Baker

72. I agree.

Lord Justice Peter Jackson

73. I also agree. I would particularly endorse what is said at paragraph 67 about the need for the parties and the court to gather all necessary information at the earliest possible stage. Accounts given by parents or carers will often frame what the lines of inquiry should be, but identifying whether a line of inquiry should or should not be pursued cannot exclusively depend on the degree of forensic emphasis given to it by one party or another. In the end the court must use its case management powers to ensure that each objectively relevant possibility is properly investigated and assessed, being mindful that a lack of information may distort its inquiry.

74. In this case, the subsequent difficulties can in my view be traced back to the case management hearing, when the court effectively foreclosed on a relevant line of inquiry. The judge was understandably concerned at the thought of a 12-year-old becoming a party, but even on the doubtful assumption that this step would become likely, it did not arise at that stage. All that was needed was the best available information about what had happened when Z was briefly in charge of Y. Had that information been gathered in a timely way, the proceedings would surely have taken a straighter and swifter course, whatever the outcome.

75. Finally, although for the reasons given by My Lady we are unable to uphold the judge's conclusions, nothing that we have said is intended to influence the course of the further hearing, at which all findings and outcomes must remain open.